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No. 01-1234

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAY COHEN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

The government's response seeks only to obscure, because it cannot refute, the two critical points of Mr. Cohen's petition. First, the petition squarely presents abiding Circuit conflicts with respect to two important federal statutes – the general federal conspiracy statute (18 U.S.C. § 371) and the Wire Act (18 U.S.C. § 1084) – including one conflict that has been expressly acknowledged and reserved by this Court on at least three occasions. Second, the petition is of critical importance because, as the government concedes, if its interpretation of § 1084 is correct, then interstate off-track betting – a multi-billion dollar state endorsed and congressionally approved industry – is flatly prohibited.

I. Mr. Cohen's Contention That He Falls Within § 1084's Safe Harbor Presents Issues That Have Divided the Circuits and Are Critically Important.

1. The government strives to mask the split between the decision below and the First Circuit's decision in *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), which held that "Congress, in adopting § 1084, did not intend to criminalize acts that neither the affected states nor Congress deemed criminal in nature." *Id.* at 1273. Although conceding that *Sterling* addressed whether certain conduct was "legal" under § 1084(b)'s safe harbor provision, the government contends that *Sterling* did not address a situation in which the relevant conduct had been prohibited (but not criminalized) by a *State*. *See* U.S. Br. at 11 (arguing that the First Circuit did not hold that "placing a bet is 'legal' *in a State that specifically prohibits it* by statute but does not attach criminal penalties to the prohibition" (emphasis added)). But *Sterling did* address the meaning of the word "legal" as applied to conduct that had been prohibited (again, without criminal penalties attaching) by *Congress*. The meaning of the single word "legal" in § 1084(b) cannot vary according to whether a state or federal government proscribes the relevant conduct, and the government offers no

argument to the contrary.[1]

Further, the government blithely dismisses the cases holding that the term "illegal gambling business" in 18 U.S.C. § 1955 covers only gambling businesses that are "in violation of state penal law," *see* Pet. at 21-22, arguing in a footnote that those cases neither "involve[] Section 1084 nor the meaning of the term 'legal.'" U.S. Br. at 11 n.5. But the government does not contest that § 1955 and § 1084 (as well as § 1952, which contains similar language) are part of a comprehensive effort by Congress to help States address the perceived problems caused by interstate gambling and should be interpreted *in pari materia*. And while § 1955 uses the term "illegal" and § 1084 uses the term "legal," the government offers no explanation for why the former should be limited to violations of state criminal law while the latter should extend more broadly.

The government next suggests that Congress endorsed the government's cramped interpretation of the word "legal" when it noted in the legislative history that New York's gambling laws would be covered by the statute. U.S. Br. at 10. What the government fails to explain is that, when § 1084 was enacted in 1961, the gambling prohibitions in New York were part of the state *penal code*. In the Penal Law of 1965, however, New York removed those prohibitions from the penal code. *See,*

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[1] To the extent that the government intends to distinguish *Sterling* by suggesting that 15 U.S.C. § 3004, the federal statute that put legality at issue in *Sterling*, created only a "private cause of action" and "did not intend that there be government enforcement," U.S. Br. at 11, that argument is meritless. Section 3004 expressly prohibited the relevant conduct, *see Sterling*, 989 F.2d at 1267 (noting that § 3004 "prohibits such wagering at OTB offices unless three parties consent"); created civil, but not criminal, liability for the conduct in question, *see id.* at 1273 (noting that the statute does not create "the specter of criminal penalties" and that violators will "be civilly liable"); and gave States authority to enforce the federal prohibition, *see id.* (violators are liable to, among others, the "host State"); *see also* 15 U.S.C. § 3006 (creating a civil cause of action on behalf of the "host State").

e.g., N.Y. Gen. Oblig. Law § 5-401 (2001) (Historical and Statutory Notes). Thus, although Congress may have expected that § 1084 would cover gambling to and from New York in light of New York's policies toward gambling in 1961, that says nothing about whether Congress would have expected § 1084 to cover such gambling once New York had amended its laws to effect its change in policy.

Indeed, the government's argument highlights a principal flaw in its position. As reflected in the legislative history and, more important, in § 1084's safe harbor provision, Congress sought to aid States in their efforts to combat organized criminal gambling activity, while respecting and accommodating state (and even international) policies toward gambling. *See, e.g.*, *Sterling*, 989 F.2d at 1273 (purpose of § 1084 was to "reserv[e] to individual states some measure of control over what forms of gambling could occur within their borders"). The government's position eliminates this critical congressional accommodation, so that even when a State chooses to decriminalize gambling, it is still a federal crime when a citizen of that State arranges for a bet to be placed in another jurisdiction where betting is legal. That interpretation is completely at odds with the statute – and with the safe harbor provision – that Congress enacted.[2]

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[2]In a final attempt to distract attention from the split, the government concedes that "it is true that the placing of a bet is not a crime in New York State," but suggests in a footnote that the safe harbor in § 1084(b) should not apply because bookmaking remains a crime in New York in some circumstances. *See* U.S. Br. at 12 n.6 (conceding that the criminal provisions of New York law apply only to an individual who is *not* the "contestant or bettor"). But the criminal status of bookmaking is irrelevant to § 1084's safe harbor provision. By its plain language, that provision is triggered when "betting" – not bookmaking – is "legal" in the relevant jurisdiction, and that is why neither the district court nor the Second Circuit deemed the government's discussion of bookmaking relevant.

2. The government next suggests that Mr. Cohen's argument must fail because the transmissions in question were bets rather than information related to bets, and thus fall outside the safe harbor. But the government does not (and cannot) dispute that Mr. Cohen's business operated in precisely the same manner as state sanctioned and congressionally approved off-track betting.[3] Thus, if the interstate transmissions at issue were bets rather than information related to bets, then most interstate OTB transmissions are also bets rather than information related to bets, the safe harbor does not apply to those transmissions, and every OTB facility that accepts interstate account wagering violates § 1084.

The government's only response is that nothing in the IHA "was intended to legalize 'interstate account wagering' even where lawful in the States involved," and that the IHA cannot help petitioner because it post-dated both the enactment of §1084 and the conduct at issue in this case. *See* U.S. Br. at 15 n.7. But the government's response mischaracterizes Mr. Cohen's position. It is not that the IHA amended § 1084 or otherwise changed the relevant criminal law; instead, the IHA, which reflects Congress' regulation of an aspect of OTB that has been occurring under state supervision on a daily basis for decades, merely confirms that Congress did not remotely consider such conduct to constitute a federal felony.

Indeed, the government's position is all the more remarkable because, as the First Circuit noted in *Sterling*, it is "beyond peradventure that Congress enacted section 1084(b) for the express purpose of allowing off-track betting in venues where states chose to legalize such activity." *Sterling*, 989 F.2d at 1272-73. This Court should not condone the government's

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[3] Nor does the government's superficial discussion of the case law distinguishing between an offer to bet and a bet itself undermine the applicability of those cases here, where an account wagering system was in place. *See* Pet. at 26-27.

efforts to secure a conviction on the basis of an interpretation that so plainly flies in the face of common sense and congressional intent.

Moreover, even if the transmissions in question were bets rather than information related to bets, the Second Circuit's conclusion that Mr. Cohen did not have to "know" they were bets conflicts with this Court's cases and is worthy of review.[4] The government attempts to recast Mr. Cohen's "knowingly" argument as a straightforward "ignorance of the law" defense. But whether a party has knowingly transmitted "bets or wagers" within the meaning of the statute is a factual question – albeit one that involves a legal element – because the meaning of "bets or wagers" is defined by reference to civil law concepts such as offer and consideration. Mr. Cohen thus does not claim a mistake of law; he claims a mistake of legal fact.

Contrary to the government's contention, *Liparota* and *Morissette* demonstrate that the word "knowingly" in § 1084 may require knowledge of a legal element. The government seeks to distinguish *Liparota* on the ground that the statute at issue there referred to a body of civil law expressly. But *Liparota* itself did not rely on that distinction and instead distinguished "mistake of legal fact" from "mistake of law" more broadly:

> In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the 'use, transfer, acquisition' etc. [of food stamps] were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal . . . . It *is*, however, a defense to a charge of

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[4]Although this question of scienter under § 1084 is independently worthy of review, if Mr. Cohen prevails on his argument that the transmissions were not bets and were legal in New York, then the Court would not have to reach the scienter question.

> knowing receipt of stolen goods that one did not know that the goods were stolen . . . .

Liparota v. United States, 471 U.S. 419, 425 n.9 (1985). This interpretation is confirmed by *Liparota*'s reliance on *Morissette*, which involved a statute that did not expressly cross-reference another statute, but instead involved knowledge of general property law. *See Morissette v. United States*, 342 U.S. 246, 248 n.2, 270-71 (1952), *cited in Liparota*, 471 U.S. at 425 n.9. *See also* Pet. at 24-26.

In other words, although the statute at issue in *Liparota* contained a particularly explicit reference to a body of civil law, that is by no means the only way that a criminal statute may contain an embedded civil-law element: a statute requiring knowledge that goods are "stolen" requires knowledge of property law, and a statute requiring knowledge that "bets or wagers" are transmitted requires knowledge of contract and other civil law. When that separate body of law is what distinguishes criminal from innocent conduct, a strong presumption in favor of scienter applies. *See Carter v. United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" (quoting *United States v. X-Citement Video,* 513 U.S. 64, 72 (1994)).[5]

United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990), which addressed 18 U.S.C. § 1953, is not to the contrary, *cf.* U.S. Br at 18; indeed, that case did not address mistake of legal fact at all. To the extent that it has any relevance here, *Mendelsohn* merely confirms that the lower

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[5]Nothing in *Bryan v. United States*, 524 U.S. 184 (1998), is to the contrary, as that case held only that the term "knowingly" generally "requires proof of knowledge of the facts that constitute the offense," and explained that the result in *Liparota* was dictated by the "text of the statute." *Id.* at 193 & n.15.

courts are in disarray as to the proper scienter requirement in § 1084 and related statutes.

3. The government lastly contends that petitioner violated the third clause of § 1084(a), which prohibits a communication "which entitles the recipient to receive money or credit as a result of bets or wagers." U.S. Br. at 16. But the Second Circuit did not pass on this argument, and it thus offers no basis for denying the petition. *See, e.g., Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999).[6]

II. There Remains a Deep and Abiding Split on the Application of the *Powell* Doctrine to § 371.

The government argues that this Court's decision in *Feola* resolved the applicability of *Powell* to § 371 and has been so interpreted by all federal courts since 1975, even though *Feola* expressly reserved the *Powell* question. The government vastly overreads *Feola* and minimizes the continuing significance of the split among the Circuits.[7]

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[6]In any event, the government's argument is meritless. The government argues here as it did on appeal (but not in the district court) that the relevant transmissions entitled WSE to "money or credit" because WSE allegedly received a "percentage of the bet." U.S. Br. at 16. This is a flat mischaracterization – WSE did not take a percentage. Instead, like many betting institutions, WSE simply offered certain odds on an event, and bettors decided whether to take those odds. If an individual bettor won a bet, WSE took nothing, and if a bettor lost a bet WSE took no more than the amount of the bet (Tr. 71-72). Moreover, if the government's interpretation were correct, then every transmission to a wagering operation (including transmissions to OTB facilities) would violate the third clause of § 1084(a), the first clause would be entirely superfluous, and § 1084(b) would never be applicable.

[7] Similarly unavailing is the government's attempt to assert that a split on the *Powell* doctrine existed in 1948, when the general conspiracy statute was reenacted and when the *Powell* doctrine was consistently applied. In addition to citing this Court's decision in *Keegan*, *see* Pet. at 16-17 & n.10, the government relies on two Second Circuit cases: *Hamburg-American Steam Packet Co. v. United States*, 250 F. 747 (2d Cir. 1918), in which the

Feola itself involved an offense – assault – that was *malum in se*, and thus *Feola*'s rejection of any scienter requirement provided no occasion to consider the application of scienter to an offense that was *malum prohibitum*. The subsequent Circuit cases relied upon by the government generally discuss or apply this *Feola* holding – sometimes with reference to a federal gambling statute – but simply do not address or decide or even mention the *Powell* doctrine, which was not presented under the facts of those particular cases. *See* Pet. at 13 n.7 (discussing and distinguishing *United States v. Blair*, 54 F.3d 639 (10th Cir. 1995), *United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991), and *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989)).

That none of these decisions – let alone *Feola* itself – in any way resolves the Circuit split that was expressly acknowledged by the Second Circuit below is well illustrated by *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), *overruled on other grounds by United States v. Stone*, 748 F.2d 361 (6th Cir. 1984), a decision that the government suggests overruled *sub silentio* the Sixth Circuit's express adoption of *Powell* in *Landen v. United States*, 299 F. 75 (6th Cir. 1924). U.S. Br. at 7-8 & n.3. But although *Leon* involves a federal gambling statute related to § 1084, and although its holding rests on *Feola*, its relevance ends there. *Leon* does no more than conclude that knowledge of a "jurisdictional requirement which is unrelated to the criminal character of the conduct" –

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court spoke only in dicta, *see id.* at 759 (stating that "the act complained of was not innocent, but dishonest and fraudulent"); *see also Landen v. United States*, 299 F. 75, 79 (6th Cir. 1924); and *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940), in which Judge Hand found in the facts before him "corrupt motive in abundance," *id.* at 292. The government utterly ignores, however, Judge Hand's 1941 decision in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941), which essentially endorsed the *Powell* doctrine. *See id.* at 273; *see also United States v. Feola*, 420 U.S. 671, 691-92 (1975) (discussing *Crimmins*); Pet. at 15 n.9.

that a gambling business involved more than five persons – need not be shown to prove a conspiracy to violate § 1955, because "[t]he special purposes underlying the imposition of criminal liability for conspiracy" are not advanced by requiring this specific knowledge. *Leon*, 534 F.2d at 674-75. In other words, *Leon* simply does not speak to questions like the innocence of the underlying act, the necessity for a corrupt motive, or even the need for some awareness of the unlawful nature of the conspiracy – it rests only on jurisdictional grounds. *See id.*; *see also, e.g.*, *United States v. Previte*, 648 F.2d 73, 81-82 (1st Cir. 1981) (recognizing the *Powell* doctrine without mentioning *Murray*, which did no more than restate the holding of *Feola* in the most general terms before overturning a conspiracy conviction on the grounds of insufficient evidence). Accordingly, it is not surprising that a post-*Feola* district court decision from the Sixth Circuit, *United States v. Reminga*, 493 F. Supp. 1351 (W.D. Mich. 1980), which the government wholly ignores, relied on *Landen* to acquit a defendant on *Powell* doctrine grounds and did not allude to *Leon* in doing so. *See id.* at 1360-61.

In short, the split among the Circuits on *Powell* remains vital. Because this case squarely presents the *Powell* issue, and because the *Powell* question continues to arise, is virtually certain to recur in the § 1084 context, and has been answered differently by a number of different Circuits, this Court should grant the petition. Unless this Court does so, the government's choice of forum – rather than the merits of the case – will determine whether defendants such as Mr. Cohen will be subject to conviction under the general federal conspiracy statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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